IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JENNIFER DAVIS,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO. 02-1250-JTM
	)	
TRACTOR SUPPLY COMPANY, *et al.*,	)	
	)	
	)	
Defendants	)	
	)	

MEMORANDUM AND ORDER

Before the court is a motion by defendant GEICO Insurance Company (GEICO) for leave to assert a cross-claim against defendant, Tractor Supply Company ("TSC"). (Doc. 31). TSC has filed a response opposing the motion (Doc. 33), and GEICO has filed a reply brief. (Doc. 36). After reviewing the briefs, the court is now prepared to rule.

Factual Background

On April 11, 2000, plaintiff purchased two large mineral tubs from TSC's retail store in Wichita, Kansas. Plaintiff assisted an employee of TSC in the loading of the mineral tubs onto her pickup, and in the process, injured her back

and hand. Plaintiff brought this suit against TSC and GEICO in the Northern District of Ohio, Western Division, and the case was subsequently transferred to the District of Kansas. (Doc. 16). Plaintiff contends TSC was negligent in not providing adequate assistance in loading the tubs into her truck and in failing to use proper procedures and safety measures in loading the tubs. Plaintiff also alleges that the above-mentioned accident is covered under the Kansas Family Automobile Insurance Policy ("the policy") she had with GEICO.

GEICO seeks leave to assert a subrogation cross-claim against TSC.[1] GEICO claims to the extent that coverage would be provided to plaintiff under the policy, said policy provides GEICO with subrogation rights to the extent of the insured's right of recovery against others. (Doc. 32 at 2). TSC counters by arguing that it is an "additional insured" under the terms of plaintiff's personal auto policy with GEICO and as such, GEICO cannot maintain a subrogation action against it. Thus, TSC argues that GEICO's subrogation claim is futile, citing ***Obstretrics & Gynecology Ltd. of Kansas City, Inc. v. Buckner***, 247 Kan. 170, 178, 795 P.2d 386 (1990).

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[1] Subrogation is the substitution of another person in place of the creditor to whose rights he or she succeeds in relation to the debt, and gives to the substitute all the rights, priorities, remedies, liens, and securities of the person for whom he or she is substituted. *See* 16 *Couch on Insurance 3d,* §222:5, p. 222-18 (2000 Ed.).

In its reply, GEICO states that TSC's legal argument is unpersuasive because ***Buckner*** deals with medical malpractice insurance and whether an insurance carrier can sue a physician employed by the corporation which purchased the malpractice policy. GEICO points out that the facts are distinguishable in this case, specifically that TSC is an independent franchise commercial retailer which has absolutely no insurance or employment relationship to either plaintiff, GEICO or the automobile involved in the insurance relationship. In addition, GEICO argues subrogation is encouraged by Kansas automobile insurance law, citing K.S.A. 40-287, 40-3133a, and 40-3117.

Standard to Amend

Fed.R.Civ.P. 15(a) provides that leave to amend shall be freely given when justice so requires. In the absence of any apparent or declared reason, such as undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment, leave to amend should, as the rules require, be freely given. ***Foman v. Davis***, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); ***Frank v. U.S. West, Inc.***, 3 F.3d 1357, 1365 (10th Cir. 1993).

A district court is justified in denying a motion to amend as futile, however, if the proposed amendment could not withstand a motion to dismiss or otherwise

fails to state a claim. ***Ketchum v. Cruz***, 961 F.2d 916, 920 (10th Cir. 1992). "A court may not dismiss a cause of action for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him to relief." ***Bauman v. Hall, M.D.***, 1998 WL 513008 (D.Kan. 1998) (citations omitted).

Discussion

As a preliminary matter, the court notes that since the policy was issued in Kansas, liability is to be determined by Kansas law. *See* ***Transamerica Insurance Co. v. Gage Plumbing and Heating Co.***, 433 F.2d 1051, 1054 (10th Cir. 1970). The court, however, finds that GEICO's reliance upon Kansas automobile insurance statutes is not determinative of the issue presently before the court. If there was a question whether GEICO has a right to subrogation, then K.S.A. 40-287 and 40-3113a(b) would be applicable. TSC, however, does not dispute that GEICO has a right to subrogation.[2] The issue presented by TSC is whether GEICO's right to subrogation is prohibited by what has generally become known as "the antisubrogation rule." *See* 16 *Couch on Insurance 3d,* §224:1, p. 224-12 to 224-15 (2000 Ed.).

[2] As noted at page 8, *infra*, the policy contains specific language allowing subrogation under virtually all types of coverage.

TSC argues that it is well-established law that an insurance company cannot maintain a subrogation action against its own insured or additional named insured. TSC relies on ***Buckne***r, 247 Kan. at 178, where the Kansas Supreme Court quoted the following passage from ***Continental Cas. Co. v. Empire Cas. Co.***, 713 P.2d 384 (Colo. App. 1985), *aff'd in part, rev'd in part on other grounds* ***Empire Cas. Co. v. St. Paul Fire & Marine***, 764 P.2d 1191 (Colo. 1988) regarding subrogation:

> An insurer cannot subrogate against its own insured to assert the indemnification claim of its named insured. [Citation omitted.] This is so because, by definition, subrogation exists only with respect to rights of the insurer against third person to whom the insurer owes no duty. [Citation omitted.] An insurance company has no subrogation rights against the negligence of its own insured. [Citation omitted.] To allow subrogation under such circumstances would permit an insurer, in effect, to pass the incidence of the loss, either partially or totally, from itself to its own insured, and thus avoid the coverage which its insured purchased. [Citation omitted.]

While the Court agrees that ***Buckner*** is factually distinguishable from the present case, the legal proposition stated in ***Buckner*** is good law. *See also* ***Transamerica Insurance Co. v. Gage Plumbing and Heating Co.***, 433 F.2d 1051, 1055 (10th Cir. 1970) (court held policy was intended to cover the subcontractor, thus subcontractor was a co-insured and immune from suit by

insurer); ***Western Motor Co. v. Koehn***, 242 Kan. 402, 405, 748 P.2d 851 (1988); ***Jackson v. Browning***, 21 Kan.App.2d 845, 852-853, 908 P.2d 641 (Ct. App. 1995); ***American Gen. Fire & Cas. Co.,*** 660 F.Supp. 557,568 (D.Kan. 1987). In ***Koehn***, the Kansas Supreme Court noted that:

> By definition, an insurer can have no right of subrogation against its own insured since its insured is not a third party but one to whom a duty to pay a loss is owed. In addition, it is generally stated that no right of subrogation arises against a person who is not a named insured but holds the status of additional insured under the policy since it must have been the intention of the parties to protect this additional insured from the consequences of his negligence by including him in the insurance coverage. (Citations omitted).

242 Kan. at 405.

In deciding whether the antisubrogation rule is applicable, the Court must first determine whether the person against whom subrogation is sought, TSC in this case, is an insured, an additional insured, or someone who is intended to be covered by the policy. ***Koehn***, 242 Kan. at 405 (to determine whether an insurer is barred from claiming a right of subrogation against a particular person, the insurance contract must be examined to determine whether it was the intention of the parties to include the person within the scope of the policy's coverage).

In examining and construing an insurance policy, Kansas courts have

recognized and applied certain basic rules of contract construction: (1) an insurance contract which is free from ambiguity is to be enforced as written; (2) if a dispute arises concerning the meaning of terms in the policy, the court will attempt to ascertain what the parties intended by considering the policy as a whole and will examine the language used by taking into account the situation of the parties, the nature of the subject matter, and the purpose to be accomplished; (3) if there is a genuine uncertainty about which one of two or more possible meanings is the proper meaning, courts will apply the "Reasonable Expectations Doctrine;" (4) the drafter of the policy must state its intended meaning clearly and distinctly and if the drafter does not make the terms clear, courts will construe an ambiguous policy in the way most favorable to the insured. *See* ***Penalosa Cooperative Exchange v. Farmland Mutual Ins. Co.,*** 14 Kan.App.2d 321, 789 P.2d 1196 (Ct. App. 1990), *petition for review denied* 246 Kan. 768 (1990); ***Transamerica***, 433 F.2d at 1054, citing ***Prime Drilling Co. v. Standard Accident Insurance Co.***, 304 F.2d 221 (10th Cir. 1962). Under the Reasonable Expectations Doctrine, the test to determine whether an insurance contract is ambiguous is not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean. ***Associated Wholesale Grocers, Inc. v. Americold Corp.*** 261 Kan. 806, Syl.2, 934 P.2d 65 (Kan.,1997); ***Farm Bur. Mut.***

Ins. Co. v. Winters, 248 Kan. 295, 300, 806 P.2d 993 (1991).

Applying these tests, the Court must determine whether TSC was intended to be an additional insured within the scope of the policy applicable in this case. In order to do so, the Court must first focus on what particular coverage might be available to TSC if it were to be considered an additional insured under the policy. This is so because the definition of "insured" varies somewhat from one category of policy coverage to another.

The present policy is divided into six sections. The first four sections provide multiple types of coverage: Section I - liability (*i.e.*, protection against claims from other); Section II - automobile medical payments; Section III - physical damage to the car; and Section IV - uninsured motorists coverage (*i.e.,* protection for injuries caused by uninsured and hit and run motorists). Each of these separate types of coverage contains a subrogation provision as follows:

> When payment is made under this policy, we will be subrogated to all the **insured**'s rights of recovery against others. The **insured** will help us to enforce these rights. The **insured** will do nothing after loss to prejudice these rights.
>
> This means we will have the right to sue for or otherwise recover the loss from anyone else who may be held responsible.

(emphasis in original). Section V sets forth the general conditions and Section VI

sets forth the amendments and endorsements, including specifically Personal Injury Protection Coverage.

Plaintiff apparently seeks recovery from GEICO for medical expenses, lost wages, and property damage to her truck, apparently alleging coverage under Section II-Auto Medical Payments Coverage. As to TSC, however, the only apparent policy coverage that might apply would be under Section I-Liability Coverages because of plaintiff's claim that TSC was negligent in not providing adequate assistance in loading the tubs into plaintiff's truck and in failing to use proper procedures and safety measures in loading the tubs..[3] The question therefore becomes whether TSC was intended to be an additional insured who was entitled to possible coverage under the policy's liability coverage in Section I of the policy.

Section I contains the following Definitions of terms:

4. "**Insured**" means a person or organization described under PERSONS INSURED.

11. "**Use**" of an auto includes the loading and unloading of the auto.

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[3] There does not appear to be any basis on which TSC could possibly claim coverage for medical payments under Section II, for physical damage to an owned automobile under Section III, for uninsured or underinsured motorist protection under Section IV or for personal injury protection benefits under the amendments to the policy.

14. "**You**" means the policyholder named in the declarations and his or her spouse if a resident of the same household.

See Doc. 32, Exhibit 2 at 3 (emphasis in original). And, under the PERSONS INSURED paragraph of Section I, the policy states that with regard to owned autos, an insured includes:

1. **you** and **your relatives.**

2. any other person using the auto with **your** express or implied consent.

3. any other person or organization for his or its liability because of acts or omissions of an **insured** under 1. or 2.

See Doc. 32, Exhibit 2 at 4 (emphasis in original).

The argument clearly can be made that the TSC employee who helped plaintiff load the tubs into her truck was "using" the truck (which specifically includes loading and unloading) with plaintiff's permission so that this employee was a "Person Insured" within the specific meaning of the policy. Likewise, TSC, is presumably being sued as an organization which is liable to plaintiff because of the alleged negligent acts of its employee in the loading of the tubs, thus bringing TSC also within the category of a "Person Insured" under the policy.

GEICO claims that TSC is neither an intended or an incidental beneficiary to the policy enjoyed by plaintiff. (Doc. 36 at 6). GEICO's argument, however, is

simply conclusory in nature. GEICO cites to no specific provision in the policy to support its conclusion, nor does it argue that the terms of the policy are ambiguous so as to allow the introduction of parol evidence on this issue.[4]

The Court acknowledges that factual situation in this case seems to be unusual. Cases dealing with the antisubrogation rule in the context of an auto liability insurance policy usually involve factual situations where the person claimed to be an additional insured was, in fact, operating the vehicle at the time of an accident with the permission of the named insured and is claimed to have acted negligently. *See e.g.,* 16 *Couch on Insurance 3d,* §224:39, pp. 224-63 to 224-64 (2000 Ed.). However, given the specific definitions of the term "insured" and "person insured," and absent any specific policy provision or exclusion to the contrary, it appears that TSC's employee (and therefore TSC) is an insured under

[4] The definition of "insured" varies somewhat depending on the nature of the coverage. For example, to be an "insured" under Section II-Auto Medical Payments Coverage, one has to have been "occupying" the owned auto while it is being operated by the insured, a resident of the insured's household, or other persons with the insured's permission. *See* Doc. 32, Exhibit 2 at 6. The same is true under Section IV-Uninsured Motorists Coverage. *See* Doc. 32, Exhibit 2 at 10. "Occupying" is further defined to mean in or upon or entering into or alighting from an owned auto. *See* Doc. 32, Exhibit 2 at 6. Similarly, to be an "insured" under Section III-Physical Damage Coverages, a person who is "using" the auto with the insured's permission must also be using the auto "within the scope of that permission." *See* Doc. 32, Exhibit 2 at 7. From these variations in definitions, it is clear that had GEICO intended to qualify the definition of "Insured" or "Person Insured" under Section I-Liability Coverages, it clearly knew how to do so.

the policy when he/she is "using" the owned automobile, including the time he/she is loading or unloading the automobile. Therefore, TSC is immune from a subrogation claim by GEICO. *See* ***Transamerica,*** 433 F.2d at 1051. Under these circumstances, the Court finds that GEICO's purported cross-claim could not withstand a motion to dismiss, and is therefore futile.

IT IS THEREFORE ORDERED that GEICO's motion to amend (Doc. 31) is DENIED.

Copies of this order shall be mailed to counsel of record.

Dated at Wichita, Kansas, on this 26th day of March, 2003.

s/ Donald W. Bostwick
DONALD W. BOSTWICK
United States Magistrate Judge